or as provided herein and provided that such variation shall take effect and be binding on the parties only after being given cognisance by the Industrial Court.

(c) Any variation to the terms of this Agreement shall be jointly deposited by both parties with the Industrial Court for its cognisance within one month from the date of the agreement of the said variation.

(d) Either party may serve on the other three months' written notice to negotiate on new terms and conditions of employment and other related matters but no such notice shall be served earlier than 1 June 1990. The party that serves the notice shall also submit proposals on terms and conditions of employment for negotiation. In the event of deadlock in negotiation, the provisions of the current terms and conditions of employment shall prevail until superseded by new terms concluded between the parties or awarded by the Industrial Court.

In the case before me there is clearly no evidence of any subsequent collective agreement. Indeed, there appears to be not even evidence of a negotiation at all. Surely, the mere act of the appellant in continuing making SRA and IA payments after 13 January 1987, cannot be described as evidence of a subsequent collective agreement which satisfied all the requirements of Part IV of the Industrial Relations Act as well as Article 2(b), (c) and (d) of the CA. Such payments appear to me to be nothing but mere gratuitous payments. As explained by learned Counsel for the appellant, the payments of the two allowances were continued pending the implementation of the new and better scheme under the CA. He went on to explain that the CA could not be implemented immediately after the signing of the CA because the parties had to obtain the cognisance of the Industrial Court first, and thereafter, the appellant needed about a month to work out the conversion from the old scheme to the new scheme; and that was why the SRA and the IA ceased to be paid only with effect from 1 March 1988.

Accordingly, I allow this appeal with costs. The order of the Labour Officer, Port Klang, is set aside. The deposit made by the appellant to be refunded.

PLENITUDE HOLDINGS SDN. BHD.

v.

TAN SRI KHOO TECK PUAT AND ANOR.

HIGH COURT, JOHOR BAHRU
DATO' P.S. GILL J.
[CIVIL SUIT NO. 22-32-89]
10 MAY 1993

JURISDICTION: Principle of res judicata and functus officio - Judgment of High Court affirmed by Supreme Court - Whether trial Judge has jurisdiction to alter and vary judgment regularly obtained, drawn up, perfected and affirmed by Supreme Court.

At the High Court, Johor Bahru, the plaintiff obtained an order for specific performance against the 2nd defendant of the sale and purchase agreement dated 20 August 1984 in respect of a piece of Estate land at a price of RM47,939,958. In fact, previously, the second defendant had terminated the said agreement and forfeited the deposit of RM4,793,995.80 on the ground that the plaintiff had failed to pay the balance sum within the stipulated period of the said agreement, or within the extended completion period. (See [1992] 4 CLJ 1882).

The second defendant appealed against the judgment of the High Court and the Supreme Court dismissed the appeal and affirmed the judgment. (See [1993] 2 CLJ 146). Subsequently, the plaintiff paid the sum of RM43,145,962.20 being the balance of the purchase price to the 2nd defendant and obtained a valid and legal title to the said land.

On 17 February 1993 the 2nd defendant filed an application at the High Court, Johor Bharu, seeking an order that the plaintiff should pay to the second defendant in addition to the balance of the purchase price of RM43,145,962 a further sum as liquidated damages calculated at RM11,000 per day as expressly provided for in clause 3.4 of the said agreement from 21 May 1985 to the date of actual payment.

Held:

[1] The second defendant has offered no satisfactory explanation why the issue of liquidated damages relating to clause 3.4 of the

agreement was not raised at the trial or why it could not with reasonable diligence have been claimed at the trial of the civil suit.

[2] In the present case, this Court was '*functus officio*' once judgment on the merits of the case had been pronounced and the order perfected. In the instant case, the Supreme Court has affirmed the judgment of the High Court and the order of the Supreme Court has been drawn up, perfected and agreed to by all parties concerned.

[Application of second defendant dismissed with costs].

Cases referred to:

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] A.C. 581 ***(refd)***

Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] 1 CLJ 548 / [1986] 1 MLJ 494 ***(refd)***

Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143 ***(refd)***

Emar Sdn. Bhd. [under receivership] v. Aidigi Sdn. Bhd. and Anor Appeal [1992] 2 MLJ 734 ***(refd)***

For the plaintiff - Wong Kim Fatt; M/s. Gulam & Wong
For the defendants - P. Royan (Robert Lai with him); M/s. Jackson & Masacorale

JUDGMENT

P.S. Gill J:

This application is concerned with the jurisdiction of a Judge to alter and vary a judgment, regularly obtained, drawn up, perfected, and affirmed by the Supreme Court.

The brief facts of the case are that by a sale and purchase agreement dated 20th August 1984 the second defendant, Rumah Nanas Estate Sdn. Bhd., agreed to sell to the plaintiff, Plenitude Holdings Sdn. Bhd., a piece of Estate land at a price of RM47,939,958. The plaintiff paid a deposit of RM4,793,995.80 but failed to pay the balance sum within the stipulated period of the contract, or within the extended completion period. The second defendant then terminated the said agreement and forfeited the said deposit.

After having heard all the evidence I came to the conclusion that the termination of the contract by the second defendant was not valid and ordered specific performance of the contract for the sale and purchase of the land in question. The second defendant appealed against my judgment and the Supreme Court dismissed the second defendant's appeal and affirmed my judgment (See [1993] 2 CLJ 146).

Subsequently, the plaintiff paid the sum of RM43,145,962.20 being the balance of the purchase price to the second defendant and obtained a valid and legal title to the land in question.

On 17 February 1993 the second defendant filed an application by way of summons-in-chambers seeking an order that for the purpose of the specific performance by the plaintiff of the sale and purchase agreement dated the 20 August 1984, the plaintiff should pay to the second defendant in addition to the balance of the purchase price of RM43,145,962.20, a further sum as liquidated damages calculated at RM11,000 per day as expressly provided for in clause 3.4 of the agreement from the 21 May 1985 to the date of actual payment.

The second defendant had applied for leave by Notice of Motion to the Supreme Court on the 1 December 1992 prior to the hearing of the appeal proper to include a new ground of appeal namely:

> Though the learned Judge ordered the agreement of sale and purchase dated 20 August 1984 between the plaintiffs as purchasers and the second defendants as vendors to be specifically performed in respect of the said land, he failed to expressly order the plaintiffs to comply with clause 3.3 of the said agreement and pay to the second defendants the sum of RM11,000 per day as payment of liquidated damages to be calculated on the balance purchase price of RM43,145,962.20 from 20 August 1985 to the date of actual payment.

The said application to include this fresh ground of appeal was dismissed by the Supreme Court prior to the hearing of the appeal proper.

In the trial proper before me in February 1992, the second defendant did not at any time raise the issue of a claim of RM11,000 liquidated damages per day in its pleadings, and it also did not file a counter-claim in the suit. During the hearing of the trial no question was asked by the second defendant's Counsel in regard to this particular claim, and neither did Counsel for the second defendant raise the matter in his submission.

However, Counsel for the second defendant submitted in support of this motion that in an

order for specific performance of a contract for sale of land, the contract continues to exist, and is not merged in the Order of the Court. As such the Court is seised of the matter until the contract is fully and finally completed. Counsel for the second defendant also submitted that the provision for liquidated damages was part and parcel of the agreement and by obtaining an order for specific performance, the plaintiff had agreed to fulfill all the obligations under the terms of the agreement, including the claim relating to the liquidated damages.

Counsel for the second defendant submitted some authorities in support of his proposition of the law. With respect the facts in the authorities submitted are not similar to those in the present case more so, where an order for specific performance had been perfected after the conclusion of the trial and affirmed by the Supreme Court.

Counsel for the plaintiff submitted that the second defendant's application amounts to a new claim in the same suit where judgment had already been given by the High Court and affirmed by the Supreme Court in the plaintiff's favour. Furthermore, the second defendant at no time since proceedings were commenced in this matter in the High Court ever raised the issue of the claim for liquidated damages relating to clause 3.4 of the agreement for sale, at the trial, either expressly or impliedly. Counsel for the plaintiff also submitted that the principle of *res judicata* applied and the second defendant was estopped from making the same or any claim under the present suit as the claim for liquidated damages under clause 3.4 of the agreement should have been raised at the trial by the second defendant in its pleadings. Lastly, he submitted that the present application by the second defendant in effect amounts to a review of the decision made by the trial Court and the Supreme Court, and that I am *functus officio* in respect of the present application.

In the case of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] A.C. 581, Lord Kilbrandon in delivering the judgment of the Court said in regard to the doctrine of *res judicata* at page 590 as follows:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115 where the judge says:
>
> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not [except under certain circumstances] permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. This plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. & Ors.* [1966] 2 All E.R. 536, Lord Guest, after stating that the principle of res judicata has developed so as to extend to what is now described as 'issue', said at page 935:
>
> > The requirements of issue estoppel still remain [1] that the same question has been decided; [2] that the judicial decision which is said to create the estoppel was final; and, [3] that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

In the case of *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 MLJ 494, Abdoolcader SCJ in delivery the judgment of the Supreme Court in its judgment stated that:

> where *res judicata* is not strictly established or where *estoppel per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formerly adjudicated upon, a scandal, and an abuse, the Court would not hestitate to dismiss the action.

In regard to this application and upon examining the pleadings in the civil suit 22-32-89, filed

in the High Court at Johor Bahru, and having heard the submissions of Counsel for the second defendant in that suit, no satisfactory explanation was given why the issue of liquidated damages relating to clause 3.4 of the agreement was not raised at the trial. The second defendant offered no reason why it could not with reasonable diligence have claimed at the trial of the civil suit, the relief it was claiming against the plaintiffs now in this application.

On the evidence before me it is abundantly clear that the second defendant knew of its right to make a claim in regard to liquidated damages relating to clause 3.4 of the agreement prior to, and at the trial, but for reasons best known to the second defendant, it chose to remain silent on this issue.

In regard to the submissions by learned Counsel for the second defendant that the Court has the jurisdiction to allow the application by the second defendant, it must be borne in mind that in the present case, apart from the reasons given above, this Court is *functus officio* once judgment on the merits of the case had been pronounced and the order perfected. In the instant case the Supreme Court had affirmed the judgment of the High Court and the order of the Supreme Court has been drawn up, perfected and agreed to by all parties concerned. See the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 and *Emar Sdn. Bhd. [under receivership] v. Aidigi Sdn. Bhd. and Anor Appeal* [1992] 2 MLJ 734.

Accordingly the application of the second defendant is dismissed with costs.

PUA LAI ONG

v.

KASSIM BIN YUNUS & ANOR.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 23-81-90]
19 MARCH 1993

TORT: Road accident - Plaintiff thrown off bus - Claim for damages for injuries sustained - Defendants not offering any evidence in rebuttal of plaintiff's evidence - Whether there was proof of contributory negligence - Whether evidence given by plaintiff could be used to infer contributory negligence - Apportionment of liability - Quantum of damages.

The plaintiff was employed as a bus conductor on a bus owned by the first defendant. The second defendant was, at all material times, the driver of the bus. During the course of a routine journey, while negotiating a roundabout, the swaying of the bus caused the plaintiff to be thrown off the bus and onto the road. The plaintiff sustained serious injuries and claimed damages against the defendants.

The defendants pleaded that the plaintiff was the author of his own misfortune in that at the material time he was positioned at the door of the bus and was repairing the door when it was unsafe to do so. At the trial the defendants offered no evidence in support of their allegations and the question that arose was whether the Court could use the evidence given by the plaintiff to infer negligence on his part.

Held:

[1] Although the burden of proving contributory negligence on the part of the plaintiff rested on the defendant, nevertheless the Court may infer contributory negligence on the part of the plaintiff from the plaintiff's own evidence.

[2] The plaintiff, as a bus conductor, was under a statutory duty to ensure the safety of everyone, including himself, while on board the bus. One of the precautions expected to be taken by a conductor to ensure the safety of passengers in the bus was to ensure that the door of the bus was always shut while the bus was in motion which the plaintiff, as conductor, had failed to do.